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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6278

CONDRADO ALMEIDA-SANCHEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The *per curiam* opinion of the court of appeals is reported at 452 F. 2d 459, and is reproduced in the Appendix (hereinafter "A.") at pages 20-35.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1971. A petition for rehearing with suggestion for rehearing *en banc* was denied on February 3, 1972. The petition for a writ of certiorari was filed on March 3, 1972, and was granted on May

22, 1972. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the provision of the Immigration and Nationality Act of 1952, 8 U.S.C. 1357(a)(3), that authorizes immigration officers within a "reasonable distance" from the border to conduct warrantless searches of vehicles for aliens violates the Fourth Amendment.

2. Whether the search of petitioner's automobile, conducted pursuant to the statutory authorization, was reasonable under the circumstances of this case.

CONSTITUTIONAL PROVISION, STATUTE AND REGULATION INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 287(a) of the Immigration and Nationality Act, 8 U.S.C. 1357(a), provides in pertinent part:

> Any officer or employee of the [Immigration and Naturalization] Service authorized under regulations prescribed by the Attorney General shall have power without warrant—
>
> * * * * *

(3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; * * *.

8 C.F.R. 287.1 provides in pertinent part:

(a)(2) *Reasonable distance.* The term "reasonable distance," as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned, any distance fixed pursuant to paragraph (b) of this section.

(b) *Reasonable distance; fixing by district directors.* In fixing distances not exceeding 100 air miles pursuant to paragraph (a) of this section, district directors shall take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States: *Provided*, That whenever in the opinion of a district director a distance in his district of more than 100 air miles from any external boundary of the United States would because of unusual circumstances be reasonable, such district director shall forward a complete report with respect

to the matter to the Commissioner, who may, if he determines that such action is justified, declare such distance to be reasonable.

* * * * *

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on June 25, 1970, of having knowingly received, concealed, and facilitated the transportation and concealment of approximately 161 pounds of illegally imported marihuana, in violation of 21 U.S.C. (1964 ed.) 176a. He was sentenced to five years' imprisonment. The court of appeals affirmed *per curiam*, one judge dissenting (A. 20-35; 452 F. 2d 459).

The facts concerning the search of petitioner's car and the seizure of the marihuana in it were stipulated in connection with a motion to suppress. The stipulated evidence (A. 11-14) was that Officers Shaw and Carrasco of the United States Border Patrol[1] stopped petitioner's car for the purpose of checking for aliens as it was traveling north on Highway 78 near Glamis, California, about fifty miles north of the Mexican border on the road from Calexico to Blythe, California. Highway 78 "is about the only north-south road in California coming from the Mexican border that does not have an established

[1] The Border Patrol is a uniformed force with the Immigration and Naturalization Service. Its mission is to detect and prevent the smuggling and unlawful entry of aliens into the United States.

check point."[2] For this reason, the road "is comonly used to evade check points by both marijuana and alien smugglers." Border Patrol officers occasionally maintain a "roving check" of vehicles and persons on that highway, and it was in accordance with such a roving check that petitioner's vehicle was stopped "for the specific purpose of checking for aliens."

The officers examined petitioner's entry card and determined that he was a resident alien from Mexicali, Mexico. In response to the officers' questions, petitioner stated he had come from Mexicali, had picked up the car in Calexico, California, and was heading for Blythe, California, where he planned to leave the vehicle and then return to Mexicali by bus. Officer Shaw then checked under the rear seat of petitioner's car for aliens. Although Shaw had never discovered an alien under the rear seat of an automobile, he had heard of such discoveries on several occasions; a recent information bulletin from Border Patrol headquarters had related a technique whereby the seat springs are removed from the rear seat cushion and aliens sit upright behind the back seat rest, with their legs doubled up under the cushion. In making this inspection, Shaw discovered packages that he believed to contain marihuana. Petitioner was then arrested, and a further search of the car

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[2] For the convenience of the Court, we are furnishing with this brief a map of the area involved. As the map shows, Highway 78 does not itself run from the Mexican border, but Glamis is on a segment of this road that heads northeast through a desolate region, and is approximately 25 air miles north of the Mexican border.

disclosed many other packages of marihuana concealed in various parts of the vehicle. The motion to suppress was denied (A. 16, 19).

SUMMARY OF ARGUMENT

1. The Border Patrol's traffic checking operations, which involve a limited inspection of certain vehicles for the presence of aliens who have entered the country unlawfully, are conducted without warrant and usually without probable cause to believe that any particular vehicle is carrying an illegal alien. We contend that these inspections satisfy the Fourth Amendment's proscription against "unreasonable" searches and seizures. The standard by which to judge the reasonableness of a search conducted on less than probable cause but as part of a program of random or universal inspections has been articulated by this Court in prior decisions: whether, balancing the governmental need against the invasion of privacy, the program as a whole is reasonable, and whether the particular inspection is an appropriate part of that program.

2. Whether a program of random or universal inspections is reasonable under the Fourth Amendment depends on the governmental objective it is designed to promote and the intrusiveness of the searches it authorizes.

a. This Court long ago recognized the special status of searches at the border, which are bottomed on the nation's inherent right to protect the integrity of its borders against the unauthorized entry of per-

sons or things. Such searches, without warrant and without probable cause, have regularly been upheld as reasonable under the Fourth Amendment. Legislation restricting the entry of aliens, which dates from the late 19th Century, is founded on the same right of sovereignty. The history of increasing restrictions on immigration has been accompanied by the growing incidence of alien smuggling and sophisticated techniques for evading inspection at ports of entry. Congress has responded by affording to immigration officers the powers they have needed to enforce Congressional immigration policy.

Because of the vastness of our land borders, it is not possible to enforce that policy effectively at the border itself. Smugglers frequently arrange to transport illegal entrants by vehicle inland from remote and infrequently patrolled crossing points. In order to apprehend these illegal entrants and to deter such smuggling operations, Congress has authorized immigration officers to inspect vehicles for the presence of aliens within a reasonable distance of the border. The traffic checking operations have been highly productive; their elimination would severely impair the effectiveness of the enforcement program.

b. The inspections authorized under the statute are carried out in a manner that ensures a minimal intrusion into the privacy of travelers. Both the decision to establish a highway checkpoint and the decision to check a particular vehicle reflect a concern for minimizing unnecessary stops and inspections, which in any event involve only a brief inter-

ruption of travel. The inspection itself is necessarily limited to places where a person could be concealed. Thus, no search may be made of the automobile's glove compartment or of the personal belongings of its occupants. Because of the relatively minor intrusion, the three courts of appeals that have passed on the issue have upheld the statute and have sustained the traffic checking operations as a reasonable and constitutional exercise of the statutory authority.

3. The check of petitioner's vehicle, which took place on a road leading north from the border that is frequently used by smugglers to evade established checkpoints on other highways, was a reasonable and proper part of a traffic check program.

ARGUMENT

The central issue in this case is whether Congress may, consistently with the Fourth Amendment, seek to ensure effective control over the illegal entry of aliens into the United States by empowering immigration officers to inspect vehicles for aliens within a reasonable distance from the border without a warrant or probable cause. The outcome turns on the constitutionality of 8 U.S.C. 1357(a)(3), for it is and has always been petitioner's broad contention that *all* searches for aliens not made at the border itself must be founded on probable cause in order to comport with the Fourth Amendment—in other words, that the statute is unconstitutional unless read to include a requirement of probable cause. It is our position, to the contrary, that the statute is a valid

exercise of Congressional power because the authority that it grants to conduct an inspection is reasonable within the meaning of the Fourth Amendment, when considered in light of the problem to which the statute is addressed and the limited intrusion on privacy that it authorizes.

I

THE FOURTH AMENDMENT PERMITS OTHERWISE REASONABLE SEARCHES WITHOUT WARRANT AND WITHOUT PROBABLE CAUSE

The accomplishment of the Border Patrol's mission depends in large measure on its traffic checking operations, which involve vehicle stops and, in a relatively few instances, a minimally intrusive physical inspection of the vehicle. To be effective, these operations must be conducted, at least in part, on a random or universal basis. Thus, while trained officers may be inclined to stop and inspect primarily those vehicles which their experience tells them are more likely to be bearing illegal aliens, they frequently determine to check, say, every fifth vehicle or, in light traffic, each vehicle that passes, without any special suspicion about particular vehicles.

We therefore do not take the position that the checking operations are justified because the officers have probable cause or even "reasonable suspicion" to believe, with respect to each vehicle checked, that it contains an illegal alien. Apart from the reasonableness of establishment of the checking operation in this case, there is nothing in the record to indicate that the Border Patrol officers had any special

or particular reason to stop petitioner and examine his car. Our position is that, just as in *Terry v. Ohio*, 392 U.S. 1, 20, "the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures."

The Fourth Amendment has two distinct branches, the first guaranteeing freedom from "unreasonable searches and seizures," and the second conditioning the issuance of warrants upon probable cause and particular description of the object. Although the two branches are normally intertwined, the Court has already held that there are circumstances where probable cause is not necessary to conduct a valid "search" or "seizure." *Terry* v. *Ohio*, 392 U.S. 1. See, also, *Adams* v. *Williams*, No. 70-283, decided June 12, 1972. In one recent line of decisions, the Court has spoken of valid searches based on warrants for certain kinds of inspection issued without probable cause to believe the particular object of the search involves a violation of law, *Camara* v. *Municipal Court*, 387 U.S. 523, and *See* v. *City of Seattle*, 387 U.S. 541. The Court has also long held that there are situations, like those involving highly mobile vehicles, where warrants may be unnecessary. *E. g.*, *Carroll* v. *United States*, 267 U.S. 132. We believe that, taken together, the principles of these cases extend to a special and historically established kind of factual setting where probable cause is absent, where a warrant is impractical, but where a brief and limited search is nonetheless constitutionally reasonable.

In *Terry* v. *Ohio*, *supra*, this Court concluded that whenever "a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person" within the meaning of the Fourth Amendment. 392 U.S. at 16. Similarly, even the essentially administrative objective of an inspection, as distinguished from a police search for criminal evidence, amounts to a "search" for Fourth Amendment purposes. See *Camara* v. *Municipal Court*, *supra*; *United States* v. *Biswell*, No. 71-81, decided May 15, 1972. Compare *Harris* v. *United States*, 390 U.S. 234. The holding of *Terry*, however, is that whether the legality of a particular kind of confrontation between police and citizens depends on the existence of probable cause turns on a balancing of the governmental interest which allegedly justifies the official intrusion upon constitutionally protected interests as against the invasion entailed by the search or seizure. 392 U.S. at 20-21. Applying that test, the Court concluded that in a setting where he has "reason to believe" he is dealing with an armed man, a law enforcement officer may conduct an appropriately limited search, even in the absence of probable cause. 392 U.S. at 27.

But it is also clear that in some situations the permissible reason to conduct a search need not be focused with particularity on the object of the search. This is the teaching of the administrative search cases, *Camara* and *See*, *supra*. In those cases, the Court determined that an "area inspection is a 'reasonable' search of private property within the meaning of the Fourth Amendment." *Camara*, *supra*, 387 U.S.

at 538. There, in the context of a city-wide program of routine and periodic building inspections for code-enforcement purposes, the constitutionality of any particular inspection was found to rest not upon probable cause to believe that a violation will be uncovered in that building but rather upon the reasonableness of the inspection program itself. Thus, in *Camara*, "the agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building" (387 U.S. at 536). The Court held in *Camara* and *See* that when entry to a particular building is refused, a warrant may be issued "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling" (*id.* at 538).

The *Camara* rationale was applied in *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, and *United States* v. *Biswell*, No. 71-81, decided May 15, 1972, to *warrantless* searches on a *random* rather than universal basis.[8] In *Colonnade* the Court held that, in view of the historic regulation of the liquor industry, Congress had ample power—which the majority concluded it had not exercised—to authorize warrantless searches of the premises of retail liquor dealers as part of a program to enforce the federal excise tax laws. In *Biswell* the Court upheld a statute

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[8] We show below why the *Camara* warrant procedure would, as in *Colonnade* and *Biswell*, be inappropriate in the case of Border Patrol traffic checking operations.

authorizing warrantless entry into the premises of licensed firearms dealers for the purpose of inspecting records or firearms as part of a program to secure compliance with the Gun Control Act. What these cases demonstrate is that under the Fourth Amendment, the governing standard is one of reasonableness. While the absence of a warrant or of probable cause about a particular person or place may raise warning signals, the absence of one or both does not necessarily condemn the practice. Any particular inspection should be upheld if the program as a whole is reasonable and if the particular inspection satisfies the criteria for conducting the general inspection. See *Camara, supra*, 387 U.S. at 538.

The Court in *Camara* itself required that since the "controlling standard" is one of reasonableness, nothing being decided there about the need for warrants was "intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations." 387 U.S. at 539. Perhaps the most solidly recognized exception to the warrant requirement has been the oft-repeated principle of *Carroll* v. *United States, supra*, that the Fourth Amendment's ordinary insistence on warrants does not apply to "goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant" because "it is not practicable to secure a warrant." 267 U.S. at 151, 153. See, also, *Chambers* v. *Maroney*, 399 U.S. 42, 48-51; *Coolidge* v. *New Hampshire*, 403 U.S. 443, 459-460.

Applying the constitutional analysis charted in the opinions we have just discussed, lower courts have sustained the constitutionality of random or universal stops and searches analogous to the Border Patrol traffic check in the present case. A number of courts, for example, have upheld random checks and roadblocks for the purpose of checking driver's licenses and registrations,[4] or to apprehend a fleeing felon,[5]

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[4] Random stops have been sustained in *Myricks* v. *United States*, 370 F. 2d 901 (C.A. 5), certiorari denied, 386 U.S. 1015; *Lipton* v. *United States*, 348 F. 2d 591 (C.A. 9); *Mincy* v. *District of Columbia*, 218 A. 2d 507 (D.C. Ct. App.); *State* v. *Kabayama*, 98 N.J. Super. 85, 236 A. 2d 164 (App. Div.), affirmed, 52 N.J. 507, 246 A. 2d 714, affirming, 94 N.J. Super. 78, 226 A. 2d 760 (County Ct.); *State* v. *Williams*, 237 S.C. 252, 116 S.E. 2d 858.

Roadblock or universal checks have been upheld in *United States* v. *Croft*, 429 F. 2d 884 (C.A. 10); *State* v. *Smolen*, 4 Conn. Cir. 385, 232 A. 2d 339 (App. Div.), certiorari denied, 389 U.S. 1044; *Commonwealth* v. *Mitchell*, 355 S.W. 2d 686 (Ky.); *City of Miami* v. *Aronovitz*, 114 So. 2d 784 (Fla.); *Morgan* v. *Town of Heidelberg*, 246 Miss. 481, 150 So. 2d 512; *State* v. *Severance*, 108 N.H. 404, 237 A. 2d 688; *People* v. *Washburn*, 265 Cal. App. 2d 665, 71 Cal. Rptr. 577.

See also *Commonwealth* v. *Abell*, 275 Ky. 802, 122 S.W. 2d 757, upholding the practice of requiring all trucks to stop at a weighing station.

See generally Comment, *Interference with the Right to Free Movement: Stopping and Search of Vehicles*, 51 Calif. L. Rev. 907 (1963); Comment, *Freedom of the Road: Public Safety vs. Private Right*, 14 DePaul L. Rev. 381, 407-409 (1965); Note, *Random Road Blocks and the Law of Search and Seizure*, 46 Iowa L. Rev. 802 (1961); Note, *The Driver's License "Display" Statute: Problems Arising from Its Application*, 1960 Wash. U.L.Q. 279.

[5] *United States* v. *Kuntz*, 265 F. Supp. 543 (N.D. N.Y.).

[Footnote continued on page 15]

or simply to investigate a suspicious gathering of vehicles.[6] Even where the stop or search reveals evidence of a different crime,[7] there is no constitutional infirmity so long as the stop is made in good faith and not as a subterfuge for uncovering evidence of the other crime,[8] and so long as the purpose is a legitimate one.[9]

The typical justification for such police activity is that society's need for road safety justifies the minor

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[5] [Continued]

And see *Brinegar* v. *United States*, 338 U.S. 160, 183 (Jackson, J., dissenting):

> If we assume * * * that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. * * *

[6] *United States* v. *Bonanno*, 180 F. Supp. 71 (S.D. N.Y.) (the Appalachin conspiracy case). The convictions were ultimately reversed *sub nom. United States* v. *Bufalino*, 285 F. 2d 408 (C.A. 2), but the court of appeals did not pass on the suppression ruling. *Id.* at 413 n. 6.

[7] *E.g.*, *State* v. *Williams*, *supra* note 4; *United States ex rel. Farrugia* v. *Bhono*, 256 F. Supp. 391 (S.D. N.Y.).

[8] See, *e.g.*, *Cox* v. *State*, 181 Tenn. 344, 181 S.W. 2d 338, and *Robertson* v. *State*, 184 Tenn. 277, 198 S.W. 2d 633, where evidence gathered during a random license check was suppressed because the license check was used as a subterfuge. But see, for the opposite disposition on similar facts, *United States ex rel. Farrugia* v. *Bhono*, *supra* note 7.

[9] The arbitrary utilization of roadblocks for universal and warrantless stopping and searching of persons and vehicles in parts of Los Angeles was held unreasonable in *Wirin* v. *Hor-*

intrusion on the privacy of travelers.[10] Similar reasoning has been used to uphold the screening and searching procedures employed at airports to minimize the danger of hijacking,[11] and to enforce agricultural quarantines.[12] Analogous situations may of course be hypothesized.[13]

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rall, 85 Cal. App. 2d 497, 193 P. 2d 470. Similarly, routine vehicle searches to "curb the juvenile problem" or "in the hope that some criminals will be found" have been held impermissible. *People* v. *Gale*, 46 Cal. 2d 253, 256, 294 P. 2d 13, 15.

[10] See, *e.g.*, *Myricks* v. *United States*, *supra* note 4, 370 F. 2d at 904:

> The State can practice preventative therapy by reasonable road checks to ascertain whether man and machine meet the legislative determination of fitness. That this requires a momentary stopping of the traveling citizen is not fatal. Nor is it because the inspection may produce the irrefutable proof that the law has just been violated. * * * In the accommodation of society's needs to the basic right of citizens to be free from disruption of unrestricted travel by police officers stopping cars in the hopes of uncovering the evidence of non-traffic crimes, * * * the stopping for road checks is reasonable and therefore acceptable. * * *

[11] See *United States* v. *Lindsey*, 451 F. 2d 701 (C.A. 3), certiorari denied, 405 U.S. 995; *United States* v. *Epperson*, 454 F. 2d 769 (C.A. 4); *United States* v. *Bell*, C.A. 2, No. 72-1322, decided July 5, 1972; *United States* v. *Slocum*, C.A. 3, No. 72-1231, decided June 13, 1972; *United States* v. *Lopez*, 328 F. Supp. 1077 (E.D. N.Y.).

[12] In *United States* v. *Schafer*, C.A. 9, No. 71-1004, decided June 5, 1972, petition for certiorari pending, No. 72-5040, the court of appeals sustained the admissibility in evidence of narcotics found during an official search, authorized by statute and regulation, of the baggage and personal effects of aircraft passengers departing Hawaii. The purpose of the search was to enforce the quarantine of certain plants and insects.

[13] See, *e.g.*, *United States* v. *Bonanno*, *supra* note 6, where the court put the following case:

[Footnote continued on page 17]

It is fair to conclude, therefore, that a vehicle stop and inspection even though without a warrant or specific probable cause is permissible under the Fourth Amendment if made as part of a program of random or universal stops that is itself reasonable, measured by the governmental need and the extent of official obtrusiveness. The remaining question, therefore, is whether the Border Patrol's program of traffic checking, as authorized by statute, satisfies the established criteria of reasonableness.

II

THE TRAFFIC CHECKING PROCEDURE IN THIS CASE IS REASONABLE UNDER THE FOURTH AMENDMENT BECAUSE IT PROMOTES A SUBSTANTIAL GOVERNMENTAL OBJECTIVE AND DOES NOT DISPROPORTIONATELY AFFECT CONSTITUTIONALLY PROTECTED INTERESTS

A. The Effective Policing of Our National Boundaries to Prevent the Entry of Unauthorized Persons Presents Peculiar and Difficult Law Enforcement Problems.

In urging the validity of the statutory authorization to conduct routine, warrantless inspections of vehicles for aliens within a reasonable distance of the border, we start with the proposition that such

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[18] [Continued]

Let us suppose that a policeman standing outside an apartment house heard a cry for help, or a cry that a woman was being attacked. He could undoubtedly stop and question all those who sought to leave the apartment house immediately thereafter, even though it again was perfectly possible that no one present was guilty of wrongdoing, and certain that not *all* of the persons stopped were guilty of the commission of a crime. [180 F. Supp. at 79 n. 15; emphasis in original.]

inspections, if made at the border itself, would clearly comport with the Fourth Amendment. This Court has recognized that border inspections of an incoming traveler's person and effects in order to establish their right to entry under the customs laws are valid notwithstanding the absence of a search warrant or any degree of suspicion directed at the individual searched. The special status of border searches and their compatibility with values protected by the Fourth Amendment were acknowledged by this Court as early as 1886 in *Boyd* v. *United States*, 116 U.S. 616, 623, where the Court observed that searches for and seizures of merchandise concealed to avoid the payment of duties, having been authorized by English statutes for two centuries and by the United States since its inception, would not be deemed "unreasonable" under the Fourth Amendment. See also *Colonnade Catering Corp.* v. *United States*, 397 U.S. 72, 75-76.

Some forty years later, in *Carroll* v. *United States*, 267 U.S. 132, 154, the Court even more explicitly recognized the sovereign's inherent right to search at the border, observing in dictum that travelers and their vehicles may, without a warrant, be "stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." [14]

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[14] Petitioner and the dissenting judge below place reliance on the immediately following sentence in *Carroll*, which

In accordance with these pronouncements, the lower federal courts have consistently held that border searches are not governed by the warrant or probable cause aspects of the Fourth Amendment, and do not violate the basic proscription in that Amendment against "unreasonable" searches and seizures. See, *e.g.*, *United States* v. *Glaziou*, 402 F. 2d 8, 12 (C.A. 2), certiorari denied, 393 U.S. 1121; *United States* v. *Weil*, 432 F. 2d 1320, 1322-1323 (C.A. 9), certiorari denied, 401 U.S. 947; *United States* v. *Warner*, 441 F. 2d 821, 832-833 (C.A. 5), certiorari denied, 404 U.S. 829. The courts have recognized also that a border search is no less reasonable if conducted a short distance from the point of entry, when the circumstances, including the time elapsed and distance traveled and the manner and extent of surveillance, provide reasonable cause to believe that any contra-

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states: "But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

For two distinct but interrelated reasons, *Carroll* cannot be said to be controlling on this issue. First, the Court in *Carroll* was addressing itself to the validity of vehicle searches in the interior of the country where no border protection objective was involved. Thus the Court did not have any occasion to consider how geographically close to the border a customs (or alien) search must be to be covered by the border search principle. Second, *Carroll* was speaking to the issue of vehicular searches for contraband and was not concerned with the problem of control over the illegal entry of aliens. As we argue later, there is a substantial difference, in terms of intrusiveness and reasonableness, between a search for contraband and a limited check for the presence of aliens.

band found on the vehicle was aboard at the time of entry or was recently smuggled. See, *e.g.*, *Alexander* v. *United States*, 362 F. 2d 379 (C.A. 9), certiorari denied, 385 U.S. 977; *United States* v. *Weil*, *supra*, 432 F. 2d at 1323. There has, in sum, never been any serious doubt that border searches, whether conducted at the national boundary or within reasonable proximity to it, are reasonable even though performed in a routine manner without specific facts casting suspicion on the particular vehicle or its occupants.

Although searches for illegal entrants are not quite as ancient as border searches under the customs laws, the basic goal is the same—preserving the integrity of our borders—and it is our position that the same constitutional principles apply. Federal legislation restricting the entry of aliens dates only from 1875, see *Kleindienst* v. *Mandel*, No. 71-16, decided June 29, 1972, slip opinion p. 8; Gordon and Rosenfield, *Immigration Law and Procedure*, Vol. 1, § 1.2 (rev. ed.), and the first statutory authorization for the inspection and medical examination of aliens was apparently the Act of March 3, 1891, 26 Stat. 1084. As the problem of illegal entry of aliens grew, Congress responded by tailoring the enforcement powers of immigration officers to fit the expanding need. Thus, at the time of World War I, when the limitations upon entry had become more severe and the incidence of evasion more widespread, Congress, by the Act of February 5, 1917, 39 Stat. 874, granted authority to immigration inspectors to "board and search for aliens any vessel, railway car, or any other conveyance, or vehicle in which they believe aliens are

being brought into the United States." 39 Stat. 886.[15] When by 1946 it had become apparent that border searches for aliens were not effective by themselves in deterring the illegal entry of aliens, Congress conferred the additional power to inspect vehicles "within a reasonable distance from any external boundary of the United States." 60 Stat. 865.[16] The 1946 language, with some modification, was carried forward in the Immigration and Nationality Act of 1952, 66 Stat. 163, which added yet a further clause empowering immigration officers to patrol private lands within twenty-five miles from an external border to prevent the illegal entry of aliens.

Thus, Congress has taken the measured steps necessary to combat the evolving techniques of evading its policy of immigration control. As the dissenting judge below acknowledged (A. 24), the enforcement problems are "peculiar and difficult" and require unique solutions. See *King* v. *United States*, 348 F. 2d 814, 818 (C.A. 9). Many thousands of aliens enter this country illegally each year by evading in-

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[15] The language was continued in approximately the same form in the Act of February 27, 1925, 43 Stat. 1049-1050, and, with the addition of "aircraft", is substantially embodied in present 8 U.S.C. 1225(a), which provides generally for inspection of entering aliens.

[16] The legislative history of the 1946 amendment is sparse, the Committee Reports indicating in essence only that the Department of Justice recommended enlargement of the search power. See H. Rep. No. 186 and S. Rep. No. 632, 79th Cong., 1st Sess. See also H. Rep. No. 1929, 78th Cong., 2d Sess., dealing with an identical bill introduced the previous year which passed the House but not the Senate.

spection, either through concealment when entering at a port of entry or by clandestine entry at other than a port of entry. The immigration officers' unquestioned power to search at entry is one effective tool in preventing illegal entry at a regular port. The problem of detecting and deterring such entry at other points is considerably more difficult.

The vastness of our land borders with Canada (3,987 miles) and with Mexico (1,945 miles) makes it impossible to detect and exclude every alien who determines to enter this country unlawfully by apprehending him on the border itself. Every effort is made to minimize the need to conduct alien detection activities in the interior by improving the efficiency of operations along the borders. The basic operation of the Border Patrol is the "line watch," whereby those points most often used by border violators are kept under surveillance by officers on foot, in vehicles, or in observation aircraft. In certain active areas the Patrol has installed electronic equipment to detect intrusions. To seal means of egress from the immediate border area, officers routinely check transportation terminals, freight and passenger trains, and railroad yards.

These operations alone, however, do not provide an effective solution to the alien control problem. For understandable reasons, the problem is most acute along our southern border, and 1400 of the 1700 men in the Border Patrol are assigned to the Mexican border. We are advised by the Immigration and Naturalization Service (hereinafter "INS") that the

method commonly employed by smugglers of illegal aliens is to arrange for a group of aliens to cross the border at a point away from a fixed station and to make their way to a predetermined spot, often led by a guide the smuggler furnishes,[17] where a vehicle supplied by the smuggler will be waiting to take them inland. See, for example, the facts in *United States* v. *Ketola*, 455 F. 2d 83 (C.A. 9), petition for a writ of certiorari pending, No. 71-6570. The principal means of detecting and preventing such smuggling activity is through the Border Patrol's traffic checking operations, conducted pursuant to the statutory authority here in issue.[18]

The authority conferred by the statute in question is actually claimed and exercised for three kinds of traffic inspection operations. "Permanent" sites are in most instances located at a point beyond the convergence of several roads leading from the border.

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[17] See *Carranza-Chaidez* v. *United States*, 414 F. 2d 503 (C.A. 9).

[18] We think it is relevant to the reasonableness of the traffic checking operations that, because illegal entrants commonly evade inspection at the border and move inland by vehicle, the inspection that would ordinarily have occurred at the border must as a practical matter be deferred to a place removed from the border. The Fifth Circuit has relied on this notion of a deferred border search in upholding the statute here in question. See, *e.g.*, *United States* v. *McDaniel*, C.A. 5, No. 71-2810, decided May 11, 1972, slip opinion pp. 4-8. The Ninth Circuit's disclaimer of reliance on this justification for the traffic checks (A. 21) may have been intended to emphasize that the standard of some suspicion, applicable to vehicular searches for merchandise (see *supra*, pp. 19-20), does not govern inspections for aliens under 8 U.S.C. 1357(a)(3).

This permits the checking of a large amount of traffic with a minimum number of officers. To avoid repeated checking of commuter and suburban traffic, the sites are removed from urban areas. There are 13 such sites, all in the area of the Mexican border and all but one located more than 25 but less than 100 air miles from the border.[19] Permanent sites are operated on a 24-hour schedule except where manpower shortages, weather conditions, or traffic flow interfere. At the site all traffic is slowed. Depending on weather and traffic conditions, the officers wave on some of the vehicles, stop some in order to question the occupants, and conduct a limited inspection of [redacted] of those that have been stopped.[20] The advantage of permanent sites is that they can be equipped to handle a large volume of traffic safely and efficiently. The disadvantage is that experienced smugglers are aware of them and can easily avoid

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[19] In addition to the factors already identified, locating the site more than 25 miles from the border permits the checking of nonresident alien crossers from Mexico who violate the terms of their admission. We are informed that over one million aliens hold crossing cards that permit their entry to visit, shop, or conduct business within 25 miles of the border for as long as 72 hours. Some 88 million such entries were made in fiscal year 1971. Additional documentation must be issued at the port of entry if the alien wishes to go farther inland.

[20] Although the decision to stop for questioning or vehicle inspection is sometimes made on a random basis, we are advised that officers frequently take into account the number of persons in the vehicle, the way the car is riding (*e.g.*, low in the rear), the size of the vehicle (*e.g.*, pick-up truck or van), and the apparent nationality of the occupants.

interception by taking a different route, walking around the checkpoint, or checking to see whether the site is in operation before attempting a run.[m]

"Temporary sites" are usually located on less heavily traveled roads if safety standards can be observed and if the terrain permits some element of surprise. Checkpoints are established at such sites at irregular intervals. The stopping and inspection procedure is generally the same as that for permanent sites.

The third form of traffic inspection, and the one used in the present case, is the "roving patrol." In this operation, used only on roads with light traffic or when weather conditions preclude a regular traffic checking operation, the officers observe traffic while cruising in a patrol car or while parked at a point where a traffic control signal requires the slowing of vehicles. Depending on the road and on other variables, the officers may stop every vehicle that passes or they may stop vehicles on a random basis. They will ordinarily inspect the trunk of a stopped vehicle.

Statistics furnished by INS show that of the estimated ten million vehicles that passed through permanent and temporary checkpoints in fiscal year 1972, fewer than two million were stopped for questioning of the occupants, and fewer than 400,000 of those vehicles stopped were subjected to an inspection. It is estimated that questioning of occupants

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[m] In an effort to combat such evasion techniques the Border Patrol employs patrols on both sides of the checkpoint and, in appropriate cases, installs electronic detection devices.

consumes an average of slightly more than one minute, while checking the trunk of an automobile takes an average of less than two minutes. Border Patrol officers are authorized only to search for aliens, and we are informed that while on occasion they will look under the body of the car or check under the hood or back seat, ordinarily inspection is limited to a look in the trunk.[23]

The Border Patrol's traffic checking operations have been highly productive. On a service-wide basis in fiscal year 1972, the Patrol located 39,243 deportable aliens through traffic checking operations, of whom 30,124 had entered the United States illegally across the land border at a place other than a port of entry.[24] This represents nearly 10 percent of the number of such aliens located by the Border Patrol by all means throughout the United States.[25]

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[23] It is estimated by INS that only two percent of the vehicles inspected are subjected to a check of the back seat. In most instances, such a check is made because the officer's suspicion is aroused by the appearance of the back panel of the trunk or because he is acting on information. A back-seat check involves only a lifting of the cushion; it causes no damage to the interior of the vehicle.

[24] Most of the remaining 9,119 had either entered illegally at a port of entry or entered legally and violated the conditions of entry.

[25] Traffic checking operations for fiscal year 1972 also netted 2,880 smugglers of aliens. Of the 39,243 deportable aliens located, 11,586 or about one-third were smuggled (*i.e.*, assisted in entry).

The kind of discovery made in the present case occurs with some regularity, although it is not the object of these vehicle

These then are the enforcement problems confronting the Border Patrol; and this is the carefully devised program it follows in attempting to meet those problems. It should be apparent that the traffic checking operations are an essential link in the enforcement chain. Were it not for the permanent and temporary checkpoints and the critical roving patrols, there would be no effective deterrent to the already common smuggling technique of transporting illegal entrants inland in vehicles from points just this side of the border. As a practical matter, once the smuggled aliens were safely in the trunk of an automobile or the back of a van, the Border Patrol would be powerless to intercept the illegal operation and the aliens could easily be intermingled with the inland population. It is not difficult to imagine that with the enforcement program thus emasculated, violators would take full advantage of the weak link. On a Mexican border of nearly 2,000 miles, it would be physically impossible, even with a multifold increase in manpower, for the Border Patrol to restore the lost deterrent by a strengthened line watch.

Given the volume of vehicle traffic and the mobility of autos on the open highways of the southwest, it would be literally impossible to confine the inspection

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inspections. During fiscal year 1972, Border Patrol officers made 670 seizures of marihuana and arrested 790 United States citizens and 237 aliens in connection with those seizures. Though precise figures are not available, it is estimated that about half the seizures were through traffic checking operations.

procedure to cars which there is probable cause to believe are smuggling aliens.[25]

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[25] There are, of course, some differences between the traffic checking here and the enforcement programs in *Camara*, *Colonnade*, and *Biswell*. Those subjected to vehicle checks are not, as in *Colonnade* and *Biswell*, licensed dealers who by accepting a license forfeit some measure of privacy. See *Biswell*, slip opinion p. 6. Nor is the danger here one of hazard to public health and safety as in *Camara* and *See*. But we believe that these are not at the heart of the balancing process and that they do not obscure the essential similarities between the Border Patrol's traffic checks and the routine inspections that this Court has authorized. The basic similarity is the practical need to enforce regulatory programs by periodic or random examination.

The Border Patrol traffic checks qualify as administrative inspections. It is true that there is a variety of criminal offenses involved in the illegal entry and transportation of aliens. *E.g.*, 8 U.S.C. 1324 (harboring, transporting, inducing illegal entry); 8 U.S.C. 1325 (illegal entry); 8 U.S.C. 1326 (reentry of deported or excluded alien); 18 U.S.C. 911 (false representation as citizen); 18 U.S.C. 1546 (misuse of visas, permits, and other entry documents); 18 U.S.C. 371 (conspiracy to commit offense or defraud United States). See generally Gordon and Rosenfield, *Immigration Law and Procedure*, Vol. 2, §§ 9.22-9.40 (rev. ed.). But the Patrol's primary mission has always been to prevent the unlawful entry of aliens into this country, and apprehension of illegal aliens is primarily for the purpose of deportation rather than prosecution. Figures supplied by the INS bear this out. In fiscal year 1972, INS officers located a total of 398,000 aliens who had entered without inspection. Prosecution for illegal entry under 8 U.S.C. 1325 or 1326 was authorized only in some 11,000 cases—less than three percent. Our point here is simply that such traffic checking is sufficiently akin to the administrative or regulatory searches authorized by this Court to be tested by the standards articulated in those decisions.

In sum, the Border Patrol's enforcement problems are indeed peculiar and difficult. The traffic checking operations are an integral and successful part of the total enforcement program, not only in permitting the apprehension of thousands of illegal aliens who would otherwise avoid detection in their effort to move inland, but also in deterring the unlawful entry of countless others for whom the risk of apprehension now appears too great. Without traffic checking, which necessarily involves some stopping of vehicles on a random or universal basis, there would be a large and inviting gap in the Border Patrol's effort to maintain the integrity of our national borders. Thus, these traffic checking operations, like the unannounced inspections in *Biswell*, are "a crucial part" of the enforcement scheme essential to the maintenance of "a credible deterrent" (slip opinion p. 5). There is no practical alternative.

B. The Traffic Checking Operations Authorized By the Statute and Carried Out Under It Do Not Unreasonably Impinge Upon Constitutionally Protected Rights

Effective implementation of congressional policy, we recognize, does not necessarily amount to constitutional justification. Thus, in addition to demonstrating a substantial governmental need for this kind of inspection program, we now turn to a discussion of the impact of the program on constitutionally protected interests.

Section 287(a) of the Immigration and Nationality Act authorizes INS officers to conduct warrantless vehicle inspections for the presence of aliens within

a "reasonable distance" of any external boundary of the United States. 8 U.S.C. 1357(a)(3). Regulations promulgated under the statute define "reasonable distance" to mean "within 100 air miles from any external boundary * * * or any shorter distance which may be fixed by the district director." 8 C.F.R. 287.1(a)(2).[26]

In applying the Fourth Amendment's standard of reasonableness to determine the validity of this statute, the Court should understand not only its historical genesis but also its mode of implementation. Despite the apparently unlimited authority the language of the statute seems to convey to board and search within a "reasonable distance" of the border, the statute has never been understood to permit arbitrary searches and has not been used as a pretext to search for evidence of other criminal conduct. Thus, the establishment of checkpoints within the 100-mile maximum fixed by regulation, 8 C.F.R. 287.1(a)(2), is based upon a consideration of various factors designed to accomplish the statutory objective with the least possible intrusion upon the privacy of travelers (see *supra*, pp. 23-25).[27]

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[26] Any vehicle stop or inspection conducted by INS officers outside the 100-mile limit must, therefore, be justified on the same basis as any other investigatory stops. See, *e.g.*, *United States* v. *Saldana*, 453 F. 2d 352 (C.A. 10); *United States* v. *Granado*, 452 F. 2d 769 (C.A. 10), both involving investigatory stops at a turnpike tollgate in Oklahoma, some 800-900 miles from the Mexican border.

[27] Though it relates by its terms only to the district director's decision to shorten the "reasonable distance," we are informed

Hence, as illustrated by the present case, the INS has not claimed and would not claim statutory or constitutional authority to make random vehicle inspections for aliens in Times Square or in front of the Lincoln Memorial, even though technically these points are within 100 air miles of an external border. There is, quite simply, not a sufficient need for such operations to justify the inconvenience they would cause, and thus they would be "unreasonable" in the constitutional sense. See *Camara* v. *Municipal Court*, *supra*, 387 U.S. at 534-535; *Terry* v. *Ohio*, *supra*, 392 U.S. at 20-21. But vehicle checks conducted in areas where the incidence of illegal entry and alien smuggling is high are, if executed in good faith and with minimum inconvenience to the traveling public, reasonable within the Fourth Amendment.

As we have seen, the broad test of reasonableness is settled: whether the governmental interest justifies the intrusion upon privacy. This requires a balancing of "the need to search against the invasion which the search entails." *Camara*, *supra*, 387 U.S. at 534-535, 536-537. Among the considerations that have entered into the balance in prior decisions are the public interest being served, the availability of alternative enforcement techniques, the history and tradition of

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that 8 C.F.R. 287.1(b) states as well the considerations that are weighed in determining the location of checkpoints. These are: "topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States * * *." See p. 8, *supra*.

the regulatory authority, the character of the search (*i.e.*, of the person, residence, business premises, or automobile), the scope of the search, the objective of the search (*i.e.*, primarily criminal or administrative), the extent of the resulting inconvenience, and the existence of statutory authority for the activity. Tested by these considerations, we submit the Border Patrol's traffic checks qualify as reasonable.

We have already discussed at pp. 17-21 the history of entry restrictions and border search authority. They are deeply rooted in the nation's sovereign right to protect the integrity of its borders against the unauthorized entry of persons and things. We have here as in *Biswell* "large interests" at stake, which as in *Camara* and *Colonnade* have traditionally been protected by regulation and close supervision.

On the other side of the balance, the traffic checks create only a relatively minor inconvenience for travelers. Because the vehicle inspections are narrowly confined in scope and objective, they involve an intrusion into privacy which, though hardly negligible, should be regarded as tolerable. As we stated earlier, only about one vehicle in five that pass through Border Patrol checkpoints is stopped at all. Of these, about 80 percent are detained for one minute while the officer asks questions of the occupants, and the remaining 20 percent are detained an additional minute for an inspection of the vehicle. In most instances that inspection involves no more than a look in the trunk of the automobile. At most, it may include

a look under the car, beneath the hood,[28] or under the back-seat cushion. The statute authorizes only searches for aliens, and the officers may not look anywhere that a person could not be concealed.[29] Thus, there may be no search of the glove compartment, or of ordinary suitcases, handbags, or containers, and the officers may not conduct a search of the persons of the occupants (except as may be justified under the established standards of *Terry* v. *Ohio*, *supra*).

Moreover, what is involved in one of these strictly limited inspections is a vehicle, not a person as in *Terry*, or a residence as in *Camara*, or even a business establishment as in *See*, *Colonnade*, and *Biswell*. This Court "has long distinguished between an automobile and a home or office." *Chambers* v. *Maroney*, 399 U.S. 42, 48. See *Carroll* v. *United States*, 267 U.S. 132, 153; *Preston* v. *United States*, 376 U.S. 364, 366-367; *Cooper* v. *California*, 386 U.S. 58, 59. Even a complete search of an automobile and all its contents is ordinarily a milder intrusion into one's privacy than a search of the home or office, since the expectation of privacy in an automobile on a public highway is less. Cf. *Katz* v. *United States*, 389 U.S.

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[28] For a case where an alien was found doubled up under the hood of an automobile, see *United States* v. *Ruiz-Juarez*, 456 F. 2d 1015 (C.A. 9).

[29] See *Valenzuela-Garcia* v. *United States*, 425 F. 2d 1170 (C.A. 9), where evidence found behind fender panels in the trunk of an automobile was excluded because an alien could not have hidden in that spot. See also *Roa-Rodriquez* v. *United States*, 410 F. 2d 1206 (C.A. 10).

347. Here the inspection is substantially less intrusive than a complete search.[20]

As implemented by the INS, the broad language of the statute has not proven to be a source of abuse. Based on such factors as topography, prior experience, and reliable information, the decision on establishment of checkpoints seeks to maximize the likelihood of detecting illegal aliens while minimizing inconvenience to the public. While the decision to check a particular vehicle is in part a discretionary one, experienced Border Patrol officers rely in large measure upon objective factors that have proven to be reliable indicia of illegal alien activity (see note 20, *supra*). Though we are informed that these vary from area to area, and are for the most part passed on by word-of-mouth, bulletins are issued to bring to the officers' attention a new smuggling technique or a recently successful enforcement practice.

Finally, the Border Patrol's traffic checking operations are conducted pursuant to specific statutory authority. This Court's observation with respect to inspection of the liquor industry in *Colonnade* is no less applicable to the nation's enforcement of its immigration restrictions: "Congress has broad author-

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[20] Petitioner's reliance upon the statement in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 479, that the "stopping of a vehicle on the open highway and a subsequent search amount to a major interference in the lives of the occupants," is misplaced. The search in *Coolidge* was an intensive one (indeed, the evidence found included gun powder taken from vacuum sweepings), and the objective was to uncover evidence of crime.

ity to fashion standards of reasonableness for searches and seizures." 397 U.S. at 77. In *Biswell*, the exercise of that power by Congress was of critical importance in assessing the reasonableness of the challenged search (slip opinion pp. 5, 6). Here as in *Biswell* the Congress has exercised its authority to fashion a standard of reasonableness. It has judged that random or universal inspections of vehicles are essential to an effective enforcement program.[21] The congressional judgment, amply supported by the realities of Border Patrol experience, is entitled to respect. The conclusion in *Biswell* is thus the appropriate conclusion here as well (slip opinion p. 6):

> We have little difficulty in concluding that where, as here, regulatory inspections further urgent federal interest and the possibilities of abuse and the threat to privacy are not of impressive dimensions, the inspection may proceed without a warrant where specifically authorized by statute.[22]

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[21] That Congress has made such a judgment with respect to the illegal entry of aliens and not with respect to contraband does not reflect a view that the public interest in excluding aliens is greater than that in excluding contraband, as suggested by the dissenting judge below (A. 28). More likely, it is based on a recognition that the enforcement problem is a different one and the inspection that would be necessary to uncover contraband in a vehicle would be a far more offensive one.

[22] The three courts of appeals that have passed on the issue have thus concluded that the statute here is a valid exercise of congressional authority under the Fourth Amendment, and that the Border Patrol's traffic checking operations are a valid

Even if random vehicle inspections without probable cause or suspicion regarding particular cars do not involve excessive interference with the constitutional right to privacy, there remains the question whether some sort of warrant system should circumscribe the program. It is our position that no warrant system can be constructed that would be feasible and meaningful.

Unlike the setting in *Camara*, we are concerned here with movable vehicles possibly concealing live human beings, and not with fixed dwellings containing possible defects not easily concealed or corrected in a short time. It would be clearly impracticable, even if manpower permitted, for an officer to seek out a magistrate each time he is refused access to the trunk of an automobile he has stopped. The traditional problems associated with delay in searching automobiles,[35] are compounded by the fact that the

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exercise of the statutory authority. See *Kelly* v. *United States*, 197 F. 2d 162 (C.A. 5) (dealing with the 1946 language); *United States* v. *DeLeon*, C.A. 5, No. 72-1052, decided June 6, 1972; *United States* v. *McDaniel*, C.A. 5, No. 71-2810, decided May 11, 1972; *Fernandez* v. *United States*, 321 F. 2d 283 (C.A. 9); *Barba-Reyes* v. *United States*, 387 F. 2d 91 (C.A. 9); *Elder* v. *United States*, 425 F. 2d 1002 (C.A. 9); *United States* v. *Miranda*, 426 F. 2d 283 (C.A. 9); *United States* v. *Avey*, 428 F. 2d 1159 (C.A. 9), certiorari denied, 404 U.S. 903; *Fumagalli* v. *United States*, 429 F. 2d 1011 (C.A. 9); *Duprez* v. *United States*, 435 F. 2d 1276 (C.A. 9); *United States* v. *Marin*, 444 F. 2d 86 (C.A. 9); *Roa-Rodriquez* v. *United States*, 410 F. 2d 1206 (C.A. 10).

[35] "[T]he car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained." *Chambers* v. *Maroney*, 399 U.S. 42, 51.

very objects of the inspection are live and mobile. In addition, since the inspections typically take place out on the highways any attempt to secure a specific court order against a driver who balked at an inspection would occasion a seriously lengthy delay for the traveler.

Nor are there practicable alternatives. Even if it were feasible to have a magistrate stationed at each permanent and temporary checkpoint, so that he could pass upon each case on the spot and without delay, his function necessarily would be either the mechanical one of authorizing the inspection in every instance or the thorough reevaluation of the administrative decision to operate the checkpoint at the particular time and place. The Court in *Camara* found a warrant procedure appropriate precisely because a neutral magistrate could perform an appropriate function *without* undertaking "any reassessment of the basic agency decision to canvass an area" (387 U.S. at 532). There he could determine whether inspection of the particular premises would be justified in terms of the standards for the canvass itself, he could fix the limits of the inspection, and he could certify the inspector's authority to enter the dwelling (*id.*, at 532, 538). None of those factors applies to the random inspection of an automobile for the presence of aliens, conducted by a uniformed Border Patrol officer.

The historic aversion to general warrants, as embodied in the Fourth Amendment, and the Court's decision in *Camara* that a magistrate should not

review the basic agency decision to canvass an area, indicate that a "warrant" approving the overall inspection program would not be a proper or useful judicial action. Hence, the interposition of a magistrate, even if it were feasible, could not add any significant protection in an otherwise reasonable inspection program.

For the foregoing reasons, we urge the Court to hold that Section 287 of the Immigration Act, as construed and implemented administratively, comports with the reasonableness standard of the Fourth Amendment. If the Court agrees with this position, the remaining issue in the case is whether the search of petitioner's car was conducted as part of a valid inspection program meeting the standards we have discussed. To that question, we now turn.

III

THE INSPECTION OF PETITIONER'S AUTOMOBILE WAS A PROPER PART OF A REASONABLE TRAFFIC CHECK

Apart from his attack on the validity of the statute and the random traffic-check program, we do not understand petitioner to challenge the administrative decision to patrol the particular road, or the decision of the Border Patrol officers to check his vehicle, or the scope or good faith of the inspection that was performed. We therefore limit our discussion here to a brief description of the road and of the enforcement practices on it. This review of the record will demonstrate that the roving traffic check which led

to the discovery of 161 pounds of marihuana in petitioner's car was reasonable.

On that portion of State Highway 78 that runs north-easterly between Brawley and Blythe, California, traffic is light and the Border Patrol does not maintain permanent or temporary checkpoints.[24] It is one of several secondary roads in southeast California carrying traffic northbound from the vicinity of the Mexican border that do not have regular checkpoints. Thus, it was known that smugglers of aliens frequently choose it as their route inland in order to avoid the risk of checks on the other north-south highways. For this reason roving patrols are regularly operated on the road.[25]

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[24] The checkpoint involved in *Fumagalli* v. *United States*, 429 F. 2d 1011 (C.A. 9), is not, as petitioner suggests (Br. 11 n. 1), only one mile from the spot where his vehicle was stopped. The "Trifolium" site, which is located in that portion of Highway 78 that runs parallel to the border west of Brawley, is some 40 miles west of the spot where petiioner was stopped.

[25] We are informed that the road is patrolled during an average of one working shift out of four, usually during midnight to 8:00 A.M. On a year-round basis, only about ten vehicles per hour use the highway during that "graveyard" shift, and at certain times of the year there may be only five or six vehicles altogether from midnight to daylight. During the night hours the patrolling officers frequently check every car that passes. We are advised that in fiscal year 1972 these Highway 78 roving patrols alone located 195 smuggled aliens, nearly two percent of all those located by Border Patrol traffic checks. During the same period there were five narcotics seizures involving 1,227.6 pounds of marihuana valued at $122,760.

Petitioner was stopped going north toward Blythe. Having determined that petitioner was a resident alien, the officers checked under the back-seat cushion for aliens and found instead the evidence here at issue. There is no question of the officers' good faith in this respect; they knew by word-of-mouth, and it had been confirmed in a recent bulletin from Border Patrol headquarters, that alien smugglers were adapting the back seats of automobiles to accommodate aliens behind the seat rest.[26]

The roving patrol on Highway 78 was and is an important supplement to the checkpoints maintained on the more heavily traveled roads nearby. The stop of petitioner's automobile was in accordance with normal roving patrol practices, and the resulting inspection was within the permissible scope of checks for aliens. Since the officers therefore acted reasonably and in accordance with established Border Patrol procedures, there is no basis for excluding the evidence that was uncovered in the process. See, *e.g.*, *Abel* v. *United States*, 362 U.S. 217, 238; *United States* v. *Schafer*, C.A. 9, No. 71-1004, decided June 5, 1972; *United States* v. *Lopez*, 328 F. Supp. 1077, 1099 (E.D. N.Y.). The court below properly so held.

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[26] INS estimates that about two percent of the vehicles inspected in traffic check operations are checked for aliens under the back seat. See note 22, *supra*.

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals sustaining petitioner's conviction should be affirmed.

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AUGUST 1972.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 474158 75